86-431

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

BEVLES, COMPANY, INC.,
Petitioner,

v.

TEAMSTERS LOCAL 986
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an arbitrator's award issued under the authority of the Federal Mediation and Conciliation Service may order the reinstatement of alien employees who are unlawfully present in the United States and not lawfully permitted to work under the laws of the United States and the State of California under circumstances where the employer is not guilty of any retaliatory animus.

2. Whether a California law which is in a dormant state of enforcement is nevertheless an explicit, well-defined and dominant public policy which must be granted deference by a federal court in deciding whether to order the enforcement of an arbitration decision contrary to such law.

LISTING OF PARTIES

Bevles Company, Inc.; Petitioner herein, Appellant before the United States Court of Appeals for the Ninth Circuit in Case No. 84-6076, consolidated with Case No. 84-6312.

Teamsters Local 986; Respondent herein and Appellee before the United States Court of Appeals for the Ninth Circuit in Case No. 84-6076, consolidated with Case No. 84-6312.

Gilberto Baraza; Real Party in Interest before the United States Court of Appeals for the Ninth Circuit in Case No. 84-6076.

Manuel Dorme, a.k.a. Felipe Noriega; Real Party in Interest and Appellee before the United States Court of Appeals for the Ninth Circuit in Case No. 84-6312.

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OCTOBER TERM, 1986

BEVLES, COMPANY, INC.,
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v.

TEAMSTERS LOCAL 986

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT PETITION FOR WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Bevles Company, Inc., the petitioner herein, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on this matter on June 17, 1986.

OPINIONS BELOW

The June 17, 1986, opinion of the Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed, is reported at ____ F. 2d ____, 1986 WLD US-0528, 86 Daily Journal D.A.R. 2114, and is reprinted in

the separate Appendix to this Petition, pp. A-1-A-7. The opinion of the Arbitrator, whose decision was upheld by the District Court, is reported at *Teamsters Local 986 v. Bevles, Inc.*, FMCS No. 83k/1690 (Dec. 26, 1983) (Monat, Arb.), and is reprinted in the separate Appendix to this Petition, pp. B-1-B-23.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1986. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Labor-Management Relations Act of 1947, as amended:

Federal Mediation and Conciliation Service

(a) Creation — Appointment of Director. There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service . . .

[29 U.S.C. § 172 (1947 ed.)]

Functions of the Service

(a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor dispute in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid

attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties . . .

[29 U.S.C. § 173 (1947 ed.)]

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application of interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

[29 U.S.C. § 173 (1947 ed.)]

The Immigration and Naturalization Act

Excludable aliens

(a) General classes. Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor had determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession or who have exceptional ability in the sciences or the arts), and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens

under this paragraph shall apply to preference immigrant aliens described in section 203(a)(3) and (6) [8 U.S.C. § 1153(a)(3), (6)], and to nonpreference immigrant aliens described in section 203(a)(7) [8 U.S.C. § 1153(a)(7)].

[8 U.S.C. § 1182(a)(14), as amended, 1980]

California Labor Code § 2805

Employment of Illegal Aliens — Fine, Civil Action

(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

(b) A person found guilty of a violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200) nor more than five hundred dollars ($500) for each offense.

(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a). (1971 ch. 1442)

STATEMENT OF THE CASE

The Petitioner

The petitioner, Bevles Company, Inc., is a small manufacturing concern located in the City of South El Monte, California. The company employs approximately 33 employees who are primarily engaged in the manufacturing and assembly of food service equipment. The bulk of the company's business is derived from customers outside of the State of California. The company ships finished product throughout the United States in interstate commerce via air, rail cars, trucks and ships. The company maintains a list of employees previously laid off for the

purposes of recalling such employees in the event a position becomes available.

The Teamsters Local 986

The Miscellaneous Warehousemen, Drivers & Helpers Local 986, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 986") is the union which is the exclusive bargaining agent for the bargaining unit of machine operators, assemblers, general helpers, shipping and receiving clerks and welders at Bevles Company, Inc. Local 986 has thousands of members in Southern California. Local 986 was the bargaining agent for Bevles employees when the Collective Bargaining Agreement at issue in the arbitration proceedings was negotiated. The local has represented in oral argument to the Ninth Circuit that a significant percentage of its members may be undocumented aliens.

The Evidence

In January, 1983, petitioner received a newsletter from its legal counsel at the time, which suggested that the Company could be subjected to criminal proceedings under California Labor Code § 2805, for employing undocumented alien workers. Thereafter, the Company inquired as to the immigration status of all of its employees. The Company allowed a period of approximately three months within which to provide proof of valid work authorizations. Two machine shop workers were dismissed after they had admitted to being aliens and were unable to produce work permits from the Immigration and Naturalization Service.

Local 986 grieved the termination of the two employees and the parties were unable to arrive at a settlement. Thereafter, the Federal Mediation and Conciliation Ser-

vice appointed an arbitrator to hear the controversies. The arbitration was conducted under the rules and pursuant to the statutory authority of the Federal Mediation and Conciliation Service.

The arbitrator found that the Company's primary motivation in discharging the two employees was its concern over criminal liability under California Labor Code § 2805. The arbitrator also found that the Company was "raided" by the Immigration and Naturalization Service in August, 1976, and that it was concerned about further raids by the INS in the future. The arbitrator concluded that no unlawful discrimination took place against the discharged employees.

The arbitrator determined that neither of the discharged employees were citizens of the United States. As to one employee [Mr. Barraza], the arbitrator found that he had applied for, but had not yet been granted, permanent resident status in the United States. The arbitrator could not determine Mr. Barraza's legal residence status.

The arbitrator also found that the other employee [Mr. Dorme] had adopted a cousin's identity and social security number after entering the United States illegally. The arbitrator determined that this employee had falsified his name, misrepresented his true identity and committed a serious offense of a wilful and deliberate nature. The arbitrator concluded that the Company had acted promptly after its discovery of this employee's fraud.

The Rulings Below

The arbitrator ruled that external law had no impact on the collective bargaining agreement and was inapplicable. He therefore ordered the reinstatement, with backpay, benefits and seniority, of Mr. Barraza. Mr. Dorme was ordered reinstated without backpay.

The district court issued its order confirming the arbitration awards and ordering the Company to comply with its terms and conditions forthwith.

The Court of Appeals for the Ninth Circuit that the arbitrator's award of reinstatement and backpay notwithstanding the immigration status of the employees neither violates a clearly defined public policy nor is it in manifest disregard of the law.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jurisdiction in the Court of Appeals for the Ninth Circuit was pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The writ should be granted for the following reasons:

1. The Ninth Circuit Decision Conflicts in Principle With Previous Supreme Court Decisions.

In *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 104 S.Ct. 2803, 84 L.Ed. 2d 732 (1984), this Court required that the sanctions imposed by the NLRB for labor law violations be reconciled with the Immigration and Naturalization Act. In *Sure-Tan,* the employer had admitted a retaliatory discharge in response to protected union activities and this Court conditioned the reinstatement of alien employees upon their lawful re-entry into the United States.

In *DeCanas v. Bica,* 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed. 2d 43 (1976) this Court ruled that the Court of Appeal erred in holding that Congress, by the Immigration and Naturalization Act, precluded any state authority to regulate the employment of illegal aliens. The Court characterized § 2805 as California's attempt to strengthen its

economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country. *Id,* at S.Ct. 936. The Court recognized that § 2805 was designed to protect the opportunities of lawfully admitted aliens for obtaining and holding job. *Id,* at S.Ct. 938 & n. 6.

The decision of the Ninth Circuit herein conflicts with the principles announced by this court in the two cases cited above. The holding of the majority fails to recognize that California Labor Code § 2805 is an expression of public policy by the Legislature of the State of California. Thus the majority opinion does not provide for a reconciliation of the terms of the collective bargaining agreement with the expression of public policy contained in Labor Code § 2805. Plaintiff agrees with the dissenting opinion of Justice Sneed that such reconciliation is both appropriate and indeed compelled by the principles announced in *Sure-Tan v. NLRB, supra.*

2. The Ninth Circuit Decided an Important Question of Federal Law Based On a Decision of a State Court of Appeal Which Was in Direct Conflict With a Decision of This Court.

The Ninth Circuit opinion largely based its holding upon the observation that the California Court of Appeal had held that California Labor Code § 2805 was preempted by federal immigration law and thus unconstitutional. *See,* Opinion at p. A-5, citing, *Delores Canning Co. v. Howard,* 40 Cal. App.3d 673 (1974). The majority acknowledged that this Court, when later presented with the issue of the constitutionality of § 2805, had ruled that Congress had not intended to provide exclusive federal regulation in the field of employment of illegal aliens. *See,* Opinion at p. A-5, citing, *DeCanas v. Bica, supra.*

The critical factor in the view of the majority of the Ninth Circuit panel was that this Court in *DeCanas, supra*, did not make an explicit finding that § 2805 was constitutional, but rather remanded the case to the California courts to decide;

> "whether and to what extent . . . § 2805 as construed would conflict with the INA or other federal laws or regulations."

See, Opinion at p. A-5.

The Ninth Circuit decision observed that upon remand the case [*DeCanas*] was dropped, and concluded that the holding of *Delores Canning Co. v. Howard, supra*, has never been repudiated. The majority determined that the enforcement of Labor Code § 2805 is in limbo and still enjoined. *See* Opinion at p. A-5, ¶ 1. Thus the Ninth Circuit majority decided that Labor Code § 2805 is now dormant and ruled;

> "*Given the confused state of the law surrounding section 2805* it is arguable that no determination by the arbitrator regarding the impact of that section could be 'in manifest disregard of the law'."

See, Opinion at p. A-5 (emphasis added).

Clearly the conclusion that the holding of *Delores Canning Co. v. Howard, supra,* has not been repudiated ignores this Court's subsequent decision in *DeCanas v. Bica, supra.* The same California statute was involved in both decisions and this Court expressly rejected the argument that the Immigration and Naturalization Act displaced the authority of the state to regulate the employment of illegal aliens. Thus the Ninth Circuit decision is based upon a decision of a California Court of Appeals which itself is in direct conflict with a prior decision of this Court.

3. The Ninth Circuit Has Decided An Important Question Of Federal Law Which Should Be Settled By This Court.

The Ninth Circuit majority ruled that since the California law was dormant and the holding of the California Court of Appeals in *Delores Canning Co. v. Howard, supra*, was unrepudiated, the arbitrator's decision was not in "manifest disregard of the law". The majority panel also ruled that this Court's decision in *Sure-Tan v. NLRB*, 467 U.S. 883 (1984) did not establish any "explicit, well-defined and dominant public policy sufficient to override the arbitrator's decision to award reinstatement and backpay. *See*, Opinion at pp. A-3 and A-4.

The dissenting opinion of Justice Sneed argued that *Sure-Tan v. NLRB, supra*, expressed a strong public policy requiring the reconciliation of labor and immigration laws, and that the arbitrator ignored this policy. *See*, Opinion of Justice Sneed (dissenting). This Court has not settled the question of whether and to what extent, California Labor Code § 2805 establishes a public policy of the State of California concerning the employment of illegal aliens nor the extent to which the principles set forth in *Sure-Tan v. NLRB, supra*, would apply to situations where the illegal alien employee remains within the territory of the United States.

It is respectfully urged that this Court is the appropriate body to resolve the "confusion" which exists concerning the enforceability of California Labor Code § 2805. The confusion surrounding the constitutionality of § 2805 began when the law was declared unconstitutional by a state appeals court interpreting federal law. The highest federal court of the region has now compounded the confusion by declaring § 2805 dormant and of no consequence.

The Ninth Circuit has now held that the principle announced by this Court in *Sure-Tan* only applies to situations where aliens are outside the territories of the United States. The question regarding the proper scope of the *Sure-Tan* decision will not be resolved unless and until this Court speaks on the issue. *See, Local 512 Warehouse and Office Workers' Union, ILGWU v. NLRB*, (9th Cir., July 22, 1986) No. 85-7281, reported in 86 Daily Journal D.A.R. 2761; also reported in RIA Employment Alert, August 21, 1986 issue (Ninth Circuit declines to enforce NLRB ruling which conditioned backpay for undocumented workers on proof that workers were legally entitled to work in the United States).

Compare, Alonso v. State of California, 50 Cal.App.3d 242, 13 Cal.Rptr. 536 (1975) (no unemployment benefits to undocumented alien employee since employee is "unavailable for work"); *Pilapil v. Immigration and Naturalization Service*, 424 F.2d 6, 11 (10th Cir. 1970) (alien present in United States unlawfully has no right to work); *Bloom/Art Textiles, Inc.*, 225 NLRB 766 (1976) (no violation of NLRA for employer to discharge an illegal alien employee where concern is a violation of state law).

CONCLUSION

The sponsors of California Labor Code § 2805 (introduced as A.B. 528) introduced it as labor law designed to reduce illegal immigration. Assemblyman Pete Chacon, a member of the [California] Assembly Committee on Labor Relations argued that;

> "The widespread use of illegal entrant workers . . . deprives unskilled and semi-skilled Mexican-Americans, citizens and aliens alike, black and white workers, of decent employment."

Hearings: House Committee on the Judiciary (June 21, 1971), p. 255, cited in, Kitty Calavita, "*California's 'Employer Sanctions': The Case of the Disappearing Law*", Research Report Series, 39, Center for U.S.-Mexican Studies, University of California, San Diego (1982) at p. 26. One commentator has argued that the impact of illegal aliens in today's labor market is indisputable;

> "First, illegal aliens depress the wages of the lower skilled native American work force. Second, given existing levels of minimum wages and welfare, for which the Americans but not the aliens are eligible, the wage reduction resulting from illegal immigration may also cause higher unemployment rates for lower skilled native workers."

Prof. Michael L. Wachter, "*The Labor Market and Illegal Immigration: The Outlook for the 1980's*", Industrial and Labor Relations Review, Vol. 33, No. 3 (April 1980), Cornell University.

The Court is respectfully urged to issue the Writ of Certiorari in the above-entitled matters and to finally determine the extent to which the labor policy of the State of California, and the immigration policies of the United States as expressed in the Immigration and Naturalization Act and the regulations promulgated thereunder affect the employment rights of admitted unlawful aliens.

Dated: September 15, 1986.

Respectfully submitted,

SNYDER, RIOS & QUEVEDO

By WILLIAM A. SNYDER
Attorneys for Petitioner

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

FOR PUBLICATION

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVLES COMPANY, INC.,

Plaintiff-Appellant,

VS.

TEAMSTERS LOCAL 986, et al.,

Defendant-Appellees.

Nos. 84-6076, 84-6312

D.C. # CV 84-739, 84-532 ER

Appeal from the United States District Court for the Central District of California.

The Honorable Edward Rafeedie, District Judge Presiding.

Argued and Submitted September 5, 1985 — Pasadena, California.

Before: SNEED, NELSON, and NORRIS, Circuit Judges.

NORRIS, Circuit Judge:

Filed June 17, 1986

Bevles Company, Inc. ("Bevles") appeals from a judgment of the district court confirming two arbitration awards pursuant to a collective bargaining agreement. Bevles contends that the arbitrator exceeded his authority under the collective bargaining agreement by granting reinstatement and backpay to employees who had been terminated by Bevles because they were undocumented aliens.

In March, 1983, Bevles received an unsolicited letter from its attorney advising that it was unlawful in California to knowingly employ an illegal alien. After receiving the letter Bevles immediately began interrogating employees it suspected of being in this country illegally. Two machine shop employees, Baraza and Dorme, were summarily dismissed after failing to satisfy Bevles that they were in the country legally. Teamsters Local 986, the employees collective bargaining representative, grieved their dismissal claiming Bevles lacked "just cause" to dismiss the employees under the collective bargaining agreement. After the Local's efforts to have Baraza and Dorme reinstated were unsuccessful, the matter was submitted to arbitration. The arbitrator ruled that, in terminating Baraza and Dorme, Bevles violated the terms of the collective bargaining agreement because, contrary to Bevles claim, it would not have been subject to criminal liability if it failed to terminate Baraza and Dorme. Thus Baraza and Dorme were entitled to reinstatement, and Baraza was entitled to backpay.[1] The arbitrator's awards were confirmed by the district court. In this appeal, Bevles contends that the arbitrator's award of reinstatement and backpay to Baraza and Dorme must be vacated because they are not legally entitled to work in this country.

We hold that the arbitrator's award of reinstatement and backpay notwithstanding the immigration status of the employees neither violates a clearly defined public policy nor is in manifest disregard of the law.[2] Neither the

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[1]The arbitrator refused to award Dorme back pay because Dorme had falsified his employment records by using the name and social security number of a cousin in filling out his employment forms.

[2]Because of the strong commitment to allow labor disputes to be resolved through arbitration rather than litigation, an award will be upheld provided it "draws its essence from the collective bargaining

company nor its employees are subject to any criminal or civil liability under federal law arising from their employment relationship. "For whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present and working in the United States without appropriate authorization. . . . Moreover, Congress has not made it a separate criminal offense for an alien to accept employment after entering this country illegally." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892-93 (1984).

We reject Bevles' claim that the Supreme Court's recent pronouncement in *Sure-Tan, supra*, prohibits the remedy granted by the arbitrator. *Sure-Tan* does not establish any "explicit, well-defined and dominant public policy," *W.R. Grace & Co. v. Local 759, International Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461

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agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (quoted in *Broadway Cab Co-op v. Teamsters Local 281*, 710 F.2d 1379, 1382 (9th Cir. 1983)). An arbitrator's award will not be vacated because of erroneous findings of fact or conclusions of law. *American Postal Workers v. United States Postal Service*, 682 F.2d 1280, 1285 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983). In order to justify reversal of an award for an error in law that error must constitute a "manifest disregard of the law," *George Day Constr. Co. v. United Bhd. of Carpenters*, 722 F.2d 1471, 1477 (9th Cir. 1984); *see also Orange Belt Dist. Council of Painters v. Kashak*, 774 F.2d 985, 990 (9th Cir. 1985).

U.S. 757, 766 (1983), sufficient to override the arbitrator's decision to award reinstatement and backpay. Although the Court in *Sure-Tan* reversed an award of reinstatement and backpay granted to illegal aliens, that limitation of remedies is inapposite to this case for two reasons. First, this court's review of an arbitrator's interpretation of a collective bargaining agreement is much more limited than its review of a decision of the NLRB in a labor dispute.[3] Second, as the Supreme Court recognized in *Sure-Tan*, the objective of the INA in limiting the NLRB's remedial powers was the prevention of unauthorized immigration. In *Sure-Tan*, the discharged employees had left the country and unconditional reinstatement and backpay would have encouraged their illegal reentry. In this case Baraza and Dorme have not been subject to any INS proceedings, thus awards of reinstatement and backpay will not require that they reenter the country illegally and "a potential conflict with the INA is thus avoided." 467 U.S. at 903.

Bevles' reliance on Cal. Labor Code § 2805 (West Supp. 1984) is also insufficient to charge the arbitrator with "manifest disregard of the law." Section 2805 state that:

> (a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers . . .

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[3]This court would give some deference to NLRB interpretations of federal labor law, *Carpenters Union Local No. 25 v. NLRB*, 769 F.2d 574, 579 (9th Cir. 1985), but certainly not such that would rise to the level of the "manifest disregard of the law" standard. Moreover, NLRB determinations of issues involving the INA would be entitled to no deference. *See Id.*

The arbitrator refused to recognize section 2805 as barring the reinstatement of Baraza and Dorme because "according to the record before the arbitrator, LC 2805 is in limbo and still enjoined." *Teamsters Local 986 v. Bevles, Inc.*, FMCS No. 83K/16910, at 12 (Dec. 26, 1983) (Monat, Arb.). This ruling of the arbitrator is not in manifest disregard of the law. The California Court of Appeal held that section 2805 was preempted by federal immigration laws and was thus unconstitutional. *Dolores Canning Co. v. Howard*, 40 Cal. App. 3d 673 (1974). Subsequently, in *DeCanas v. Bica*, 424 U.S. 351 (1976), the Supreme Court was presented with the issue of the constitutionality of section 2805. The Court held that Congress had not, through passage of the INA, intended to provide exclusive federal regulation in the field of employment of illegal aliens. The Supreme Court, however, did not determine finally that section 2805 was constitutional, but remanded the case to the California courts to decide "whether, and to what extent . . . § 2805 as construed would conflict with the INA or other federal laws or regulations." *DeCanas*, 424 U.S. at 365. On remand the case was dropped, and the holding of *Dolores Canning* has, therefore, never been repudiated.

Moreover, the Local presented unrefuted evidence that the Labor Commission is not attempting to enforce section 2805 and that the regulations implementing that section were repealed in 1982. Given the confused state of the law surrounding section 2805 it is arguable that no determination by the arbitrator regarding the impact of that section could be "in manifest disregard of the law." Certainly the determination that section 2805 did not preclude the relief granted was not so.

CONCLUSION

The arbitrator's decision granting reinstatement and backpay to two undocumented aliens was not rendered in "manifest disregard of the law,"and thus is not reviewable in this court. The Supreme Court has determined that undocumented workers are protected by the provisions of collective bargaining agreements, and limited remedies only to the extent that they invite further immigration violations. *Sure-Tan, supra.* The California law which allegedly prompted the dismissal is dormant and the arbitrator was not in error in determining that it did not authorize the employees' dismissal. Accordingly, the district court's order confirming the arbitration award is

AFFIRMED

SNEED, Circuit Judge, Dissenting:

Bevles Company v. Teamster's Local 986 —

Nos. 84-6076/84-6312

Filed June 17, 1986.

I would hold that the arbitrator's award is "contrary to ... some explicit [,] ... well defined and dominant" public policy. *W.R. Grace & Co. v. Local 759 International Union of the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766 (1983). The majority do not read *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), as expressing such a policy. I differ with this reading. *Sure-Tan* unmistakably requires that the sanctions imposed by reason of the labor law be reconciled with the immigration laws. 467 U.S. at 903. The arbitration award attempts no such reconciliation. It could have done so by providing that reinstatement and back pay were permissible only when plaintiffs Baraza and Dorme became "lawfully entitled to be present and employed in the United States." *Id.* The mere presence of Baraza and Dorme in the United States does not provide the "reconciliation" of which *Sure-Tan* spoke. Had it done so, the *Sure-Tan* Court would not have approved the Board's conditioning its remedy of reinstatement on the employees' legal reentry. It would have adopted a position that permitted reinstatement and back pay at such time as the employees once more were available to work without regard to their status as illegal aliens. This *Sure-Tan* did not do. It expressed a strong policy of requiring reconciliation of labor and immigration laws. The arbitrator ignored this policy.

I respectfully dissent.

APPENDIX B

ARBITRATOR'S OPINION AND AWARD

In the Matter of Arbitration Between

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 986
GILBERTO BARRAZA, Grievant

AND

BEVLES COMPANY, INC.

FMCS Case No. 83K/16910

APPEARANCES:

For the Company: SNYDER & RIOS
By: WILLIAM A. SNYDER, ESQ.
One Newport Drive
1301 Dove Street,
Suite 400
Newport Beach, CA 92660

For the Union: PAPPY, KAPLON, VOGEL & PHILLIPS
By: RALPH M. PHILLIPS, ESQ.
1545 Wilshire Boulevard, Suite 211
Los Angeles, CA 90017

Also Present: John Sheffield, Esq., Witness
Gilberto Barraza, Grievant
Bob Garcia, Local 986 Business Agent, Witness
John Walter, Vice President/General Manager, Bevles Company, Witness
Helen Ruiz, Translator/Interpreter
Cal Norman, Interpreter

Hearings were held at the law offices of the Union Counsel on July 27 and August 23, 1983. All proceedings were conducted under oath and FMCS rules. The parties

filed post-hearing briefs which were received October 10th after the parties waived time limits at their request. Under the rules of the FMCS and the collective bargaining agreement, this award is timely issued.

BACKGROUND AND FACTS

The grievant was hired on August 16, 1974, and was continuously employed by the Company since then. He was the second most senior employee in the plant. His immigration status was never questioned until 1983. In January 1983, John Walter, Vice President for Bevles, received an unsolicited "newsletter" from an attorney, Gary Manulkin, purporting to be legal advice on the employment of undocumented workers (VE1). In this letter, Manulkin suggested the Company could be subject to criminal proceedings for employing undocumented workers under Labor Code (LC § 2805).

On February 10, 1983, Mr. Walter sent a memo (VE2) to all employees, including Sr. Barraza, requiring them to provide Immigration and Naturalization Service (INS) documents to prove their legal status. On February 28, 1983, the grievant was ordered by memo to appear at the Main Office with the required documents. But about March 1, 1983, the Company received a letter from John Sheffield, an immigration attorney representing the grievant, saying the grievant's case was still before the American Consulate in Ciudad Juarez, Mexico.

On March 4, the grievant met with the Company but did not provide the requested documents specified in Manulkin's letter. The Company discharged the grievant on March 18, 1983. The bases for the discharge were "rules and regulations, California Labor Code, and the 'just cause' provision of the collective bargaining agreement (CBA) (JE4)."

Following this, about March 29, 1983, the Company received a second letter from Sheffield advising it that LC § 2805 was declared unconstitutional and was not being enforced, and that the grievant was entitled to permanent residence on the basis of the Immigration and Naturalization Act (INA), Section 244(a)(1). As before, the Company made no contact with Sheffield.

STIPULATIONS

The parties stipulated the matter was properly before the Arbitrator, having fulfilled the requirements of the grievance procedure in the CBA. Also, the parties agreed the Arbitrator has the authority to decide the legal issues in this case.

ISSUES

The issues were stipulated to be (JE1):

a) Was the grievant, Gilberto Barraza, discharged for just cause?

b) If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

Article I: Management Rights

1. Except as otherwise specifically provided in this Agreement, the company reserves the right to make all decisions relating to the conduct of the business, including by way of example and not by way of limitation, the following:

a. The right to manage the business, to schedule the hours of work, to establish, modify or change work schedules or to direct and determine the size of the working forces including the right to select, hire,

promote and transfer employees, to relieve employees for just cause, and to determine internal training procedures in accordance with policies established or to be established by the Company.

Article VIII: Scope of Agreement and Separability of Provisions

1. *Scope of Agreement*

a. Except as otherwise provided herein, this Agreement fully and completely incorporates the understanding of the parties hereto and constitutes the sole and entire agreement between the parties on any and all matters subject to collective bargaining. Neither party shall, during the term of this Agreement, demand any change therein nor shall either party be required to bargain with respect to any matter.

2. *Separability of Provisions*

a. Should any Article, Section or provision of this Agreement be declared illegal by final judgment or a court of competent jurisdiction, such invalidation of such Article, Section, or provision shall not invalidate the remaining portions hereof, and such remaining portions shall remain in full force and effect for the duration of this Agreement.

b. Upon such invalidation the parties agree immediately to meet and negotiate substitute provisions for such part or provisions rendered or declared illegal or an unfair labor practice.

3. *Unlawful Action Not Required*

a. The parties agree that neither will willfully require the other of their respective members bound hereby to do or perform any act prohibited by law.

Article XI: No Discrimination

1. Neither the Company nor the Union shall discriminate against any employee because of such employee's race, color, religion, sex, or national origin; and to the extent provided by applicable State and Federal law, neither the Company nor the Union shall discriminate against any employee's age, physical handicap or medical condition.

Article XV: Responsible Union-Company Relationship

1. The Company and the Union recognize that it is in the best interests of both parties, the employees, and the public that all dealings between them continue to be characterized by mutual responsibility and respect. To insure that this relationship continues and improves, the Company and the Union and their respective representatives at all levels will apply the terms of this Agreement fairly in accord with its intent and meaning consistent with the Union's status as exclusive bargaining representative of all employees covered by this Agreement. Each party shall bring to the attention of all employees in this unit covered by this Agreement, including new hires, their purpose to conduct themselves in a spirit of responsibility and respect and of the measures they have agreed upon to insure adherence to this purpose.

PERTINENT STATUTES

1. California Labor Code (LC) § 2805 (UE1)

Employment of Illegal Aliens — Fine, Civil Action (1971 ch. 1442)

a. No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

b. A person found guilty of a violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200) nor more than five hundred dollars ($500) for each offense.

c. The foregoing provisions shall not be a bar to civil action against the employer based upon violation of subdivision (a).

2. Immigration and Naturalization Act of 1952, as amended

(a) 8 USCA § 1254 (UE9)

Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and —

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence . . .

(b) 8 USCA § 1259 (UE4)

Record of admission for permanent residence in the case of certain aliens who entered the United States prior to June 30, 1948

A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application . . . and he establishes that he —

(a) entered the United States prior to June 30, 1948;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship.

(c) 8 USCA § 1324 (UE5)

. . . Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

CASES CITED

1. *Delores Canning v. Howard,* 50 Cal. App 3d 673 (1974) (UE3)

2. *Delores Canning v. Milias,* Case No. 016-928 (1972) (UE13)

3. *ILGWU v. Sureck,* 681 F2d 624 (UE14)

4. *De Canas v. Bica,* 424 VS 351 (1976) (UE2)

5. *Alonso v. State of California,* 50 CA 3d 242 (1975) (CE3)

6. *NLRB v. Apollo Tire,* 604 F2d 1180 (1979)

POSITION OF THE COMPANY

The issue presented to the Arbritrator is whether an alien employee's inability to provide a valid work permit from the INS is good cause for discharge. It is undisputed that the grievant is an undocumented worker. The grievant has not shown U.S. immigration law does not apply to him or that LC § 2805 is unconstitutional. His own immigration attorney admitted the grievant is a deportable alien.

Furthermore, the number of aliens applying for *Silva* visas outnumbers visas available. The Company has met its obligations with respect to advance notice of its policy requiring INS work permits.

The Company argues that the State of California is not pre-empted from regulating the employment relationship covered by Labor Code (LC) § 2805 in a manner consistent with pertinent Federal laws. *Delores Canning Co., v. Howard* (40 C.A. 3d 673, 15 Cal. Rptr. 435 (1974) was decided on an issue of Federal law. With respect to LC § 2805, the appellate court said that it was "unconstitutional because Congress wanted uniform Federal regulations on employment of aliens, barring state action . . . It interferes with a comprehensive regulatory scheme enacted by Congress in . . . its exclusive power of immigration."

The court in *Delores Canning* (440, 441) concluded Congress did not want to burden employers with eliminating illegal alien workers from the labor market. The court questioned whether the Immigration and Naturalization Act (INA) was sufficiently broad or comprehensive without an administrative agency "to pre-empt the field and bar state action." The court said also that LC § 2805 was aimed at helping California residents seek jobs, not immi-

gration control. Congress controls immigration and so California's law is unconstitutional.

The reasoning of *Delores Canning* has been invalidated. *Delores Canning* was decided by a California appellate court on a Federal question. *Alonso v. State of California,* 50 C.A. 3d 242, 12 Cal. Rptr. 536 (1975) better accommodates Federal/State regulatory conflicts. The court found no pre-emption. The plaintiff was an alien who applied for unemployment in California but refused to provide INA documents or state if he entered the United States legally. He was denied benefits because he was "unavailable for work." Yet *Alonso* took the same position as the grievant, Barraza, citing *Delores Canning.* The *Alonso* court found both *Delores Canning* and *DeCanas v. Bica,* 40 C.A. 3d 976, 115 Cal. Rptr. 444, distinguishable and inapplicable.

Alonso found that an illegal alien has no rights under the U.S. Constitution to equal employment opportunity and no right to work. Both the Federal government and State of California have a legitimate interest in the issue. One's status is not for the purpose of enforcing or subjugating the Federal immigration laws. Title 8 controls when aliens will be allowed to work in the U.S. The State of California has a duty not to undermine the . . . intent of Congress or alien registration laws.

The U.S. Supreme Court has invalidated the reasoning of *Delores Canning.* In *DeCanas v. Bica* the Court found that the INA did not preclude state authority to regulate employment of illegal aliens (at page 941). It has "never held" that every state law dealing with aliens is about immigration and so pre-empted. LC § 2805 was viewed as California's effort to adopt Federal standards in imposing criminal sanctions against employers who knowingly employed undocumented aliens. LC § 2805 falls within the state's police powers to regulate employment. The

supremacy is to reconcile state and Federal laws, not oust one over the other. This section of the Labor Code seems "to be designed to protect opportunities of lawfully admitted aliens . . . There is evidence that Congress intends that states may regulate the employment of illegal aliens" consistent with Federal law.

Next, the Company argues the application of LC § 2805 here is consistent with Federal law and legitimate state interests. It says, "No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States." In the California Administrative Code (CAC), Title 8, part I, chapter 8, article I, §§ 16209-16209.6, it is provided that an admitted alien shall be requested to produce documents showing legal residency, which will then be sufficient proof of lawful resident status. This means the alien must have Form I-151 or any other INS document authorizing him to work. Failure to provide such proof leads to the inference that the grievant's entry into the U.S. was illegal (Alonso, supra, p. 247).

The grievant, Gilberto Barraza, has never presented or offered to present any INS document authorizing him to work in the United States. The grievant concedes he has no such documents, thus allowing the "inference that his entry into this country was illegal" (*Alonso* at 247). His attorney concedes the grievant is only *eligible* for relief from deportation, not yet having been granted such relief.

The Company should not be penalized for the failure of the INS to enforce immigration laws or the grievant to abide by U.S. laws. Given the grievant's posture and the enforceability of LC § 2805, the grievant was discharged for just cause.

POSITION OF THE UNION

The Union argues it is not a violation of any state or Federal law to employ an illegal alien. In 1971 California enacted LC § 2805 covering the employment of illegal alien workers. This section was immediately challenged in *Delores Canning v. Milias* and in 1972 Superior Court declared § 2805 unconstitutional because of vagueness and Federal preemption. The California Court of Appeal upheld in *Delores Canning v. Howard*. Hence, the permanent injunction issued against enforcing § 2805 by Superior Court is still in effect (UE 15).

The Company cannot apply *DeCanas v. Bica* to argue § 2805 is constitutional, thereby reversing *Delores Canning*. The U.S. Supreme Court did not rule specifically on the constitutionality of § 2805 in *DeCanas*. Ruling that the INA did not preempt all of the immigration field, the Court remanded to California courts on the constitutionality of § 2805 (*DeCanas* at 362). *Delores Canning* is still law in California since the *DeCanas* petitioners abandoned the case after the USSC ruling. No new legislation has been enacted since the *Delores Canning* ruling. The Union produced a letter from the Assistant Chief Labor Commissioner that the Labor Commissioner is not enforcing § 2805 (UE 15).

Next, the Union argues there is no Federal law prohibiting employment of illegal aliens. The INA, § 1324, prohibits harboring aliens but in section a employment does not constitute harboring (UE 5).

The Company has not shown *Alonso* to be determinative. *Alonso* ruled on the issue of an alien's entitlement to unemployment, not on the right to be employed in California regardless of immigration status.

It was argued by Bevles that a raid by the INS would disrupt company activities and cause deportation of the

grievant. But in *ILGWU v. Sureck*, 9th Circuit, (1982), the INS was seriously restricted in its authority to conduct broad-scale raids because such raids violated the 4th Amendment. The INS was now required to obtain a valid search warrant or obtain company consent. Expert witness Sheffield has curtailed its raids and has not yet appealed *Sureck*. Under these conditions, the Company would have advance warning of a raid and could plan production to avoid disruption. The Company's concerns are unfounded.

The grievant is not subject to deportation. Section 1254 of the INA would suspend deportation if the individual "(1) has been physically present in the U.S. for a continuous period of not less than seven years, (2) is of good moral character, and (3) has a spouse, parent or child who is a citizen of the U.S." (UE 9). The grievant meets all these tests and prima facie would not be deported. Witness Sheffield testified, without rebuttal, that the grievant is entitled to remain in this country for up to two years during suspension of deportation proceedings.

There were no other factors present to establish just cause for the grievant's discharge. The Company initially claimed its Rules and Regulations were a basis for discharge (UE 11). But the rules say nothing about immigration or alien status for discipline or discharge.

The grievant's immigration status was not questioned over nine years of service. Nor has his status caused any problems for the Company.

Finally, the Company discriminated against the grievant on the basis of national origin, violating Article XI: No Discrimination Clause, of the CBA. The Company virtually admits this by its reason for discharge based on immigration status.

The appropriate remedy is reinstatement with full back pay and benefits. No enforced state or Federal law prohibits employment of illegal aliens. In *NLRB v. Apollo*, 604 F2d 1180 (9th Circuit, 1979), employed aliens were considered by the NLRB to be "employees" under the NLRA. The Company was not allowed to rely on LC § 2805 since it could not show some enforcement action by California. The Ninth Circuit in *Apollo* confirmed § 2805 is not enforced at present. *NLRB v. Sure-Tan*, 109 LRRM 2995 (1982) affirmed *Apollo* in the 7th Circuit.

The Company cannot argue it acted in good faith and so should not have to pay back pay. The Company acted on legal advice at its own peril. The Company failed to verify Manulkin's advice or to contact Sheffield after reviewing his letters. The discharge was arbitrary and precipitous. Article XV requires the Company to act "in a spirit of responsibility." The grievant should be made whole.

OPINION OF THE ARBITRATOR

The issues presented to the Arbitrator require a decision based upon the applicability of both arbitration law and statute law, as well as court decisions. The arbitration law is the well-established set of principles of just cause. The statute and court case law refer to whether or not California Labor Code § 2805 is constitutional and if it is presently enforced.

The Company based the grievant's discharge on three factors: (1) Rules and Regulations of the Company, (2) California Labor Code § 2805, and (3) just cause as stated in Article I, section (1)(a) of the CBA. The specific reason was that the grievant failed "to provide the Company with adequate proof of . . . a valid work permit pursuant to . . . the INA" (JE 4).

The Arbitrator, as a trier of facts, finds that the record of this hearing demonstrates the Company's primary motivation in discharging the grievant was its concern over criminal liability under LC § 2805. The record shows virtually no testimony or evidence, other than the Rules and Regulations itself (UE 11), to support a motivation for discharge based on said rules. In fact, the rules are silent with respect to immigration and illegal aliens. The grievant was not charged with violating any specific rule. Hence, just cause was based in the Company's view on the failure of the grievant to provide specific documentation under California law, either LC § 2805 or California Administrative Code (CAC) §§ 16209-16209.5. The language of the discharge letter was specific and unequivocal. (JE 4).

If LC 2805 is not applicable law and the Company's concern over criminal liability was not reasonable or justified, then normal just cause would apply.

External Law and Arbitrator Authority. In writing this opinion and finding of facts, the Arbitrator is mindful that this authority stems from the four corners of the labor agreement. There is no written language granting such authority although the agreement contains a separability provision and unlawful agreement provision. However, the parties authorized the Arbitrator specifically to rule on the impact of external law on the labor agreement.

Thus arises the issue of unlawful action anticipated by Article VIII (3) of the labor agreement. In this Article, the parties agree not to require the other to perform any act prohibited by law. The Arbitrator, following the so-called "Middle Ground Approach" discussed by Britton[1], finds the parties intended external law to apply to this

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[1]R. L. Britton, *The Arbitration Guide,* Prentice-Hall, 1982, at p. 46.

agreement and have provided for binding arbitration to resolve disputes.

Arbitrator Draznin, *California-Sample Service, Inc.,* 70 LA 338 (1978) at 340-41 concludes that an arbitrator "must take into full account external law as it exists and measure the impact of such law upon the contractual relationship and the facts of the case."

As noted, there is a divergence of opinion among arbitrators as to whether such authority as granted in the instant case should be accepted. If there is a general rule among arbitrators, Fairweather suggests it is to find a way to write an award compatible with both contract and external law.[2] The parties came to the Arbitrator for finality. In the oft-quoted words of Arbitrator Draznin, "the Labor agreement does not exist in a vacuum,[3] and the INA and immigration were issues in that case.

Status of LC § 2805. The major finding of fact upon which this case hinges is whether or not LC § 2805 is valid and enforced. The several court cases submitted into evidence by the parties traces a line of legal decisions which appear at first blush to declare this section unconstitutional (*Delores Canning v. Howard,* supra.). Then there is *DeCanas v. Bica* (supra) in which the U.S. Supreme Court (USSC) specifically reversed the reasoning of *Delores Canning.* Yet *DeCanas* was dropped by its plaintiff before it could be reheard by the California Court of Appeals. Testimony of union witness Sheffield, an immigration attorney, was that no cases on this point followed *DeCanas* nor had the California Legislature

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[2]Owen Fairweather, *Practice and Procedure in Labor Arbitration,* 2nd edition, BNA Books, 1983. Chapter XVI provides an excellent discussion of all sides of the external law varsus contract debate among arbitrators.

[3]*California-Sample Service Company, Inc.,* 70 LA 338 at 341.

acted to clarify the area. In addition, CAC §§ 16209-16209.6 were removed from the C.A.C. on December 15, 1982.

The Union argued that the California Court of Appeals upheld a Superior Court decision that LC § 2805 was unconstitutional and that Congress had pre-empted the field sought to be covered by the statute, excluding all action by California. The permanent injunction issued by the Superior Court judge appeared to be in effect.

The Union would have the Arbitrator accept its position that since the USSC did not make a specific ruling in *DeCanas* on LC § 2805, the *Delores Canning* injunction was still in effect. The USSC did send the construction and constitutionality of LC § 2805 back to California courts to decide.

A careful reading of *DeCanes* shows that the Court did specifically discuss § 2805 and its constitutionality. First, the Court said that § 2805 was not an "invalid state incursion on federal power." (at 936). The Court saw California's motivation in passing LC § 2805 was economic, to control employment under its police powers, not to control immigration. A state has the right to use its police powers to protect citizens and legal aliens (at 936). So the Court said that LC 2805 was not unconstitutional and California was not necessarily pre-empted from acting in this area.

However, the lifting of the permanent injunction of *Delores Canning* was left to the California court on remand, which never came when the case was dropped. The USSC said,

> "there are questions of construction of § 2805(a) to be settled by the California courts before a determination is appropriate whether, as construed, § 2805(a), 'can be enforced without impairing the

> federal superintendence of the field' covered by the INA . . ." *DeCanas* at 940
>
> "it is for the California courts to decide the effect of these administrative regulations in construing § 2805(a), and thus to decide in the first instance whether and to what extent § 2805 as construed would conflict with the INA or other federal laws or regulations." *DeCanas* at 941

According to the record before the Arbitrator, LC 2805 is in limbo and still enjoined. Neither the State legislature nor Court of Appeals have acted to lift the injunction. The Union introduced a letter from the Assistant Labor Commissioner (UE 15) to this effect. However, the Arbitrator can assign only a little weight to this letter as it was solicited by the Union without the opportunity for cross-examination by Company. The best evidence would have been the testimony of the Assistant Labor Commissioner on a letter where discovery had taken place. Some weight is allowed as it is consistent with testimony on the record from witness Sheffield. Also, the removal of C.A.C. 16209-16209.6 from the California Administrative Code adds weight to the inference LC 2805 is still in force.

The Company seeks to show the validity of § 2805 through the introduction of *Alonso v. State of California* (50 CA 3d 242, 123 Cal-Rptr. 536) (1975). *Alonso* found, in part, that an alien in the U.S. illegally has no constitutional right to work nor does that alien have the right to equal employment opportunity (at 248). The *Alonso* court specifically denied Alonso the protective umbrella of *Delores Canning* or *DeCanas* because the plaintiffs in the cases were U.S. citizens and Alonso was an undocumented alien. Also, the Labor Code was not an issue in *Alonso* but was used by Alonso to attempt to shield himself to claim unemployment. Thus, *Alonso* denies protection to illegal aliens with respect to employment. This

is consistent with later cases such as *LIGWU v. Sureck,* 681 Fed 2d 624 (9th Circuit), a case not on point but which did require knowledge of alien status and a search warrant before the INS could search the workplace. The dissenting opinion in *Alonso* is noteworthy because it establishes that *Delores Canning* was still the law in California.

Article VIII 3: Unlawful action Not Required. The Company argued in its post-hearing brief that, irrespective of the validity of LC 2805, CAC § 16209-16209.6 creates the same obligation on the employer to check INS documentation; "If the employee acknowledges he is an alien, he *shall be requested* to produce a document which shows he is entitled to work in the United States." (emphasis added by Arbitrator). Several INS documents are listed as proof of lawful resident status. These sections no longer exist and the argument is moot. There can be no unlawful action if there is no law or code to violate.

Raids by the INS. The Company, through its Vice President, John Walters, raised as a defense of its discharge of the grievant, that it was concerned about raids by the INS. This defense is effectively blocked by the Union's introduction of the *Sureck* case (supra). This 1982 decision of the Ninth Circuit, which has jurisdiction over California, severely restricted the use of broad searches of factories in search of illegal workers. The Court established the need for the INS to have probable cause, specific names of suspected illegal aliens, and search warrants. Testimony by Union expert witness Sheffield, largely undisputed, this case has yet to be appealed by INS and such broad searches have been cut back. The Company would appear to have adequate warning in the unlikely event of a search by INS so that its work force would not be disrupted. The Company was "raided" once in August 1976 with three of its employees

removed by INS. The grievant was not one of those removed. So the Company's experience with INS searches was neither extensive nor recent.

Arbitrator Eagle, *Redmer Plastics, Inc.* 79 LA 351 (1982) at 356, found that a company's experience with INS raids was a factor in determining whether the company was reasonable in suspending a grievant for failing to provide proper documentation. But in *Redmer Plastics* the company had been raided by INS three (3) times since 1967 (to 1981). This was found to be a serious economic loss and disruption, a legitimate concern of management. In the instant case of *Bevles*, one raid in seven years and *Sureck* would mitigate that concern.

No Discrimination. The Union attempted to establish a *prima facie* case of discrimination on the basis of national origin in violation of *Article IX. DeCanas* effectively took away that argument when it denied illegal aliens the right to EEO protections. *Alonso* established that the failure to provide documentation raised the presumption of illegal status. It is not clear that the grievant cannot be deported as a *Silva* applicant. Arbitrator Draznin, *California-Sample Service*, supra at 341, denied this same argument when to find discrimination would have put the Company in jeopardy of criminal violation. It is clear in this case that criminal violations would not occur. *Decanas* and *Alonso* suggest, as just noted above, how the conflict in laws would be resolved. It must be considered that there were many other Hispanics in the Company work force. The Arbitration finds no discrimination took place against the grievant.

Findings. The Arbitrator finds that the Company was not subject to criminal sanctions for violation of LC § 2805. The record established that this section was presently enjoined from being enforced. The related California Administrative Code §§ 16209-16209.6 were repealed

December 15, 1982. Thus, there were no criminal or civil penalties to be risked if the Company was found to have failed to check documentation. The Company was not likely to be raided without ample warning as a result of the *Sureck* decision. The record showed the Company had no recent experience with INS raids and its only raid occurred over seven (7) years ago, before *Sureck*. The disputed residence and deportation status of the grievant as a *Silva* applicant cannot be clarified by the Arbitrator. This can only be done by competent jurisdiction.

Hence, external law has no impact on the collective bargaining agreement. The Company does not at present, according to the record, suffer any significant liability, criminal or civil in California, for failing to check for INS documentation. The outcome of this case rests solely on the just cause provision of the labor agreement, Article I (1) (a).

Just Cause. Of the three reasons the Company gave the grievant for his discharge (JE 4), only the "just cause" rationale remains to be discussed. The Company did not specify how its "Rules and Regulations" (UE 11) were violated by the grievant. External law was found not to apply and it therefore did not create a legitimate concern of management.

The record shows that the grievant is not a U.S. citizen. Letters from the grievant's immigration attorney (UE 7, UE 8) establishes him as a citizen of Mexico who has applied for but not yet been granted permanent resident status in the U.S. A memo from the Company to the grievant predating the above letters showed the Company knew of his foreign citizenship. In 1976 the grievant admitted to the Company he was not a U.S. citizen (C 1). On this declaration, the grievant claimed to be legally in the U.S. for purposes of employment. Yet the Company

did not mention falsification of Company records as a specific rule violated or as the basis for discharge.

The facts are not in dispute that the grievant was asked to produce INS documentation on at least three occasions, two by memo, once on February 10, 1983 U 1), and once on February 28, 1983 (U 6). At the investigatory hearing on March 4, 1983, the grievant failed for a third time to produce the requested INS documentation, submitting only his social security card (UE 10), evidence considered unacceptable by the Company based on the Manulkin letter (UE 1). And though the grievant undisputedly meets the major tests of *Silva,* he does not yet have a *Silva* visa.

The grievant was a nine-year employee of the Company who had never been asked for his documentation and who had cleared a 1976 raid by the INS. The Company knew his *citizenship* at the time of hire.

At the time of his discharge, at least one other worker, Manuel Kiones, was not discharged, even though he provided only a social security card. To a degree the Company acted inconsistently. Though the grievant was given ample time and opportunity to provide documentation, the request was not reasonable because no external law required it. The Company was not damaged by the grievant's not providing papers.

Another point of interest concerns the Company's failure to respond to the letters of the grievant's attorney. Although the labor agreement and grievance procedure are between Union and Company, and there was no showing that the Union did not provide adequate representation, grievant sought private counsel on a matter of external law related to his employment status. As this status became part of the alleged just cause for discharge,

it was reasonable to expect the Company to respond or communicate with grievant's attorney.

With respect to the Company's reliance on Mr. Manulkin, the Union is correct that all advice is followed ultimately at one's own peril. However, the Company did discuss Manulkin's letter with him before taking action. The Company might have taken steps to resolve the conflict of legal opinion between Mr. Manulkin and Mr. Sheffield.

In sum, the Arbitrator finds the grievant was not discharged for just cause. No specific rule was violated. External law relied upon by the Company was not applicable to this labor agreement. Hence, the Company's request for proof of INS documentation was not, in this fact situation, a reasonable exercise of Management's Rights under Article I.

Remedy. The appropriate remedy in the case of unjust discharge is reinstatement with full back pay, benefits, and seniority. However, the contract (Article VI, section 2(d)) requires that back pay be offset by wages earned elsewhere and unemployment compensation.

AWARD

1. The Company did not have just cause when it discharged the grievant on March 18, 1983.

2. The grievant shall be reinstated with back pay, benefits and seniority subject to Article VI, section 2(d), which provides for the offset of unemployment and other compensation.

3. The Arbitrator retains jurisdiction until the award is implemented.

Jonathan S. Monat, Ph.D.
Arbitrator

December 14, 1983
Long Beach, CA 90803

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On September 15, 1986, I served the within Petition For Writ of Certiorari in re: "Bevles Company, Inc. vs Teansters Local 986" in the United States Supreme Court, October Term 1986;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Robert Vogel
Wohlner, Kaplon, Phillips, Vogel, Shelley & Young
1545 Wilshire Blvd., Suite 211
P.O. Box 17925
Los Angeles, California 90017

All Parties Required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on September 15, 1986, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

86-431

No. _____

Supreme Court, U.S.
FILED
DEC 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1986

BEVLES COMPANY, INC.,

Petitioner,

v.

TEAMSTERS LOCAL 986,

Respondent.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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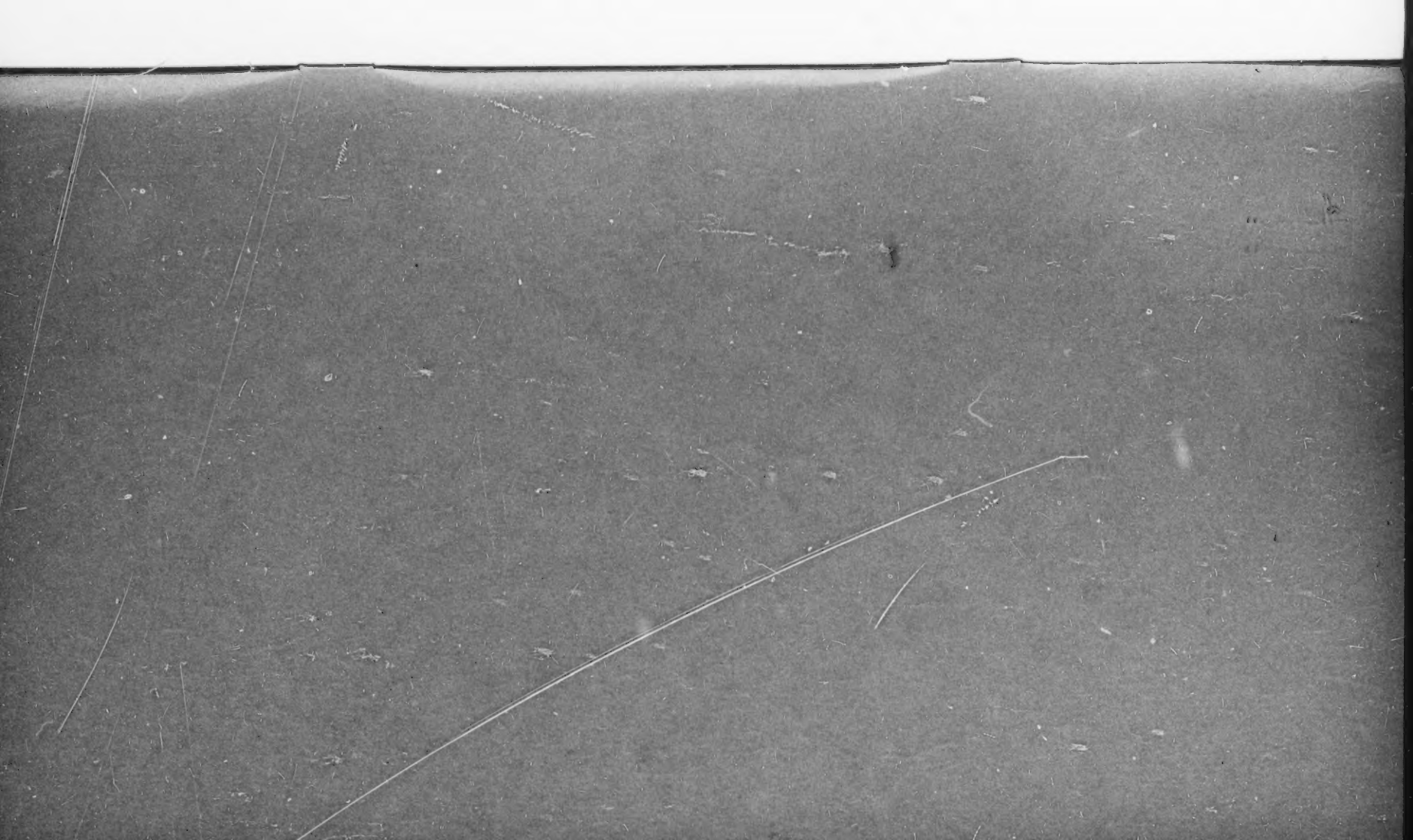

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In the Supreme Court of the United States

October Term, 1986

BEVLES COMPANY, INC.,

Petitioner,

v.

TEAMSTERS LOCAL 986,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Teamsters Local 986 ("Union") respectfully prays that a writ of certiorari not issue to review the opinion of the court of appeals for the Ninth Circuit rendered in this case on June 17, 1986 published at 791 F.2d 1391 (9th Cir. 1986).

RELEVANT STATUTES NOT CITED IN PETITION FOR WRIT OF CERTIORARI

Section 8(a)(3) of the Labor-Management Relations Act, 29 U.S.C. Stat. 158(a)(3), provides in pertinent part:

> "It shall be an unfair labor practice for an employer—

* * *

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

Section 1140.4(b) of the California Labor Code provides in pertinent part:

> "The term 'agricultural employee' or 'employee' shall mean one engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivision shall be construed to include any person other than those persons excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Section 2(3) of the Labor-Management Relations Act . . . ."

Section 1160.3 of the California Labor Code provides in pertinent part:

> "If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss resulting from the employer's refusal to bargain, and provide such other relief as will effectuate the policies of this part. Where an order directs reinstatement of an employee,

backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him."

STATEMENT OF THE CASE

On March 18, 1983, Petitioner Bevles Company, Inc. ("Bevles") terminated Gilbert Baraza ("Baraza") because he was allegedly an illegal alien and did not possess valid documentation from the United States Immigration and Naturalization Service ("INS") permitting him to work legally in the United States and California. During Baraza's nine (9) years of employment, Bevles was unaware of his undocumented status.

On the same day, Bevles terminated Manuel Dorme ("Dorme") for falsification of employment records. When Dorme was hired in 1976, he used his cousin's name and social security number, professing to be a legal resident, in filling out his employment application since he was in the country illegally. During his employment, Dorme was never questioned about his legal status, name or the admittedly false information he placed on his employment application at the time of his hiring.

The terminations of Baraza and Dorme were triggered by Bevles' receipt of an unsolicited letter from its attorney suggesting that it was unlawful in California to knowingly employ an illegal alien. Since Baraza was unable to substantiate to Bevles' satisfaction he was in California and the United States legally, he was summarily terminated. Similarly, when Dorme's true identity and undocumented status were disclosed, he was discharged.

When the union proved unsuccessful in securing their reinstatement to employment, the contractual propriety

of their discharges was submitted to final and binding arbitration in accordance with the collective bargaining agreement Bevles and the union were signatory to which provided that employees could only be fired for "just cause."

At the commencement of the arbitration hearings, Bevles and the union stipulated that "the arbitrator has the authority to decide the legal issues in this case" and "the impact of external law on the labor agreement." [*See* Petition for Writ of Certiorari ("Petition"), B-3 and B-14.][1]

After the arbitration hearings, both parties submitted briefs. In its written argument, Bevles advocated that it was contractually permissible for it to have terminated Baraza and Dorme because California Labor Code Section 2805 ("Section 2805") imposed criminal sanctions and provided for a private cause of action against employers who knowingly hired aliens not entitled to lawful residence in the United States if such employment would have an adverse impact on lawful resident workers. Bevles stressed that its reliance upon Section 2805 in terminating the employees was appropriate and California's concern in seeking to restrict the employment of undocumented workers was not preempted by federal law. In asserting that position, Bevles primarily relied upon two (2) decisions interpreting California law, *Alonso v. State of California,* 50 Cal.App.3d 242 (1975), and *DeCanas v. Bica*, 424 U.S. 351 (1976).

At no time did Bevles advocate before the arbitrator that it relied upon or the contractual propriety of its

---

[1]Since Bevles in its Petition failed to append the Arbitrator's Opinion and Award in the Dorme case, it is reproduced in the Appendix to this brief.

conduct was governed by the application of federal law or policy. Rather, Bevles proclaimed that its reliance upon state law and policy governed the arbitrator's resolution of the dispute and that, in discharging two (2) undocumented workers, it had acted in a manner consistent with peripheral federal concerns.

In its brief, the union stressed that Bevles was advised, prior to terminating Baraza and Dorme, that the Los Angeles Superior Court had declared Section 2805 unconstitutional on federal preemption, equal protection and due process grounds and permanently enjoined its enforcement and that the California Court of Appeals thereafter affirmed the Superior Court's decision on preemption grounds, finding it unnecessary to consider the due process or equal protection issues. *See Dolores Canning Co. v. Howard*, 40 Cal.App.3d 673 (1974).

Thus, a permanent injunction enjoining the enforcement of Section 2805 in southern California was in effect at the time Baraza and Dorme were terminated.

Additionally, the union contended that Bevles' reliance upon the decision in *DeCanas* was misplaced because this court remanded that case back to the California courts for a decision on the constitutionality of Section 2805 because California courts in the first instance should decide whether it was unconstitutional or conflicted with federal laws and regulations governing immigration. Since *DeCanas* was never heard on remand, the union argued that the state appellate decision in *Dolores Canning* and its affirmance of the lower court's permanent injunction enjoining the enforceability of Section 2805 was the present state of the law in California. Its claim was bolstered by the fact that the administrative regulations promulgated to enforce Section 2805 had been repealed and removed from the California Administrative Code in December of 1982.

Thus, at the time the employees were discharged and the arbitrator rendered his decisions, "[t]he only sanctions that employers have to fear [in California] for hiring illegal workers are . . . the possible embarrassment and incovenience of having deportation proceedings brought against an employee." Mainland, *Counseling Employers Who Hire Aliens*, California Lawyer, Vol. 4, No. 3, p. 9 (March 1984).

On December 14, 1983, the arbitrator concluded that Bevles violated the collective bargaining agreement in terminating Baraza because it was not subject to criminal sanctions for violating Section 2805 in continuing to employ him. Since Bevles was not susceptible to "any significant liability, criminal or civil in California, for failing to check for INS documentation", the arbitrator declared that Bevles' reliance upon California law was misplaced and its insistence upon proof of INS documentation was not a reasonable exercise of management rights under the collective bargaining agreement. [Petition, B-20.]

As a result, the arbitrator ordered that Bevles immediately reinstate Baraza with full back pay, benefits and seniority.

Soon thereafter, on December 26, 1983, the arbitrator ordered that Dorme be reinstated but without back pay. Although he rejected Bevles' reliance upon California law for the same reasons advanced in his earlier decision, the arbitrator reasoned that because of Dorme's willful and deliberate misrepresentations concerning his true identity, he was not entitled to back pay. [A 16-A17 appended hereto.]

In a timely fashion, Bevles moved to vacate both arbitration awards in the United States District Court for the Central District of California. In doing so, Bevles

did not advocate that the contractual dispute was governed by principles of federal law or that it relied upon such in terminating Baraza and Dorme.

It was only on appeal to the Ninth Circuit after the district court confirmed the awards and this court rendered its decision in *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), that Bevles contended for the first time that the arbitration awards ordering the reinstatement of two (2) undocumented workers manifested a total disregard of relevant federal law and policy and, as a result, warranted their judicial vacation.

THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS RENDERED BY OTHER CIRCUITS NOR DOES IT UNDERCUT CALIFORNIA OR FEDERAL POLICY AS INTERPRETED BY THIS COURT

Bevles misconstrues the lower court's opinion in declaring that it ignored this court's holding in *DeCanas*. [Petition, pp. 8-9.]

The Ninth Circuit generously concluded that the state of the law in California concerning Section 2805 at the time the arbitrator made his decisions was "confused". Since the arbitrator correctly concluded that Section 2805 had been declared unconstitutional by the California Court of Appeals and a permanent injunction had been entered enjoining its enforceability, the court below correctly held that the arbitrator had not manifestly disregarded relevant California law or public policy in rendering the awards. In fact, rather than evidencing a manifest disregard of California law, the arbitrator's decisions were in strict conformity with it and since Bevles would not be breaking the law or engaging in an illegal act by complying, the awards were

similarly not violative of California public policy. *Compare Mini-Ranch Farms*, 7 ALRB No. 48 (1981), where the California Agricultural Labor Relations Board ("ALRB"), in discussing eligibility to enjoy the remedies provided individuals by California Labor Code Section 1160.3, remarked that the state legislature precluded the ALRB from differentiating between employees on the basis of citizenship or immigration status. The ALRB also commented that the reference to "employee" in California Labor Code Section 1140.4(b) broadly included undocumented aliens.

The Ninth Circuit's opinion in this case is similarly not violative of federal policy as enunciated by this court in *Sure-Tan*.

In *Sure-Tan*, this court was concerned with the statutory rights of undocumented workers to remedial relief under the Labor-Management Relations Act ("LMRA"), 29 U.S.C. Stat. 158 *et seq.*, and not with whether undocumented workers should be stripped of contractual rights negotiated on their behalf by a union solely because of their undocumented status.

As the court below held, upholding an arbitration award providing reinstatement and backpay to undocumented workers who have been discharged without just cause in violation of a collective bargaining agreement can be easily reconciled with this court's decision in *Sure-Tan* notwithstanding the immigration status of the employees.

In *Sure-Tan*, this court dealt with the National Labor Relations Board's ("NLRB") application of federal labor law, not an arbitrator's interpretation of a collective bargaining agreement where judicial review is much more limited. On this basis alone, the Ninth Circuit's opinion is clearly distinguishable from this court's holding in

Sure-Tan. In accord, Garment Workers Local 512 v. NLRB, ___F.2d___, 122 LRRM 3113, 3128 n. 1 (9th Cir. 1986) (Beezer dissenting).

Additionally, in *Sure-Tan*, this court said that a conflict did not exist between the LMRA and the Immigration and Naturalization Act ("INA"), 8 U.S.C. §101 *et seq.*, and accepted the proposition that "the provisions of the LMRA are applicable to undocumented alien employees." 467 U.S. at 894. *In accord, NLRB v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1183 (9th Cir. 1979) ("federal immigration statutes neither prohibit employers from hiring illegal aliens nor prohibit such aliens from working and exercising rights protected by the NLRA" and "[w]ere we to hold the NLRA inapplicable to illegal aliens, employers would be encouraged to hire such persons in hopes of circumventing the labor laws. The result would be more work for illegal aliens and violations of the immigration laws would be encouraged") and *Garment Workers Local 512, supra*, 122 LRRM at 3124.

The right to employment is even more compelling when the undocumented worker's terms and conditions of employment are governed by a collective bargaining agreement freely negotiated by his employer and union since "an employer may affirmatively agree through a bargaining agreement to make backpay payments that he would not be obligated by the labor laws to make". *Id.* at 3128 n. 1.

Sure-Tan only addressed the employment status of undocumented workers who were in Mexico during the relevant time period. Since this court believed that the NLRB should take into account the congressional objective of deterring unlawful immigration embodied in the INA, it denied backpay to those undocumented workers who were unavailable for work during the

relevant time period and conditioned offers of reinstatement upon their subsequent lawful reentry into this country. In fashioning such a remedy, it would not only avoid a potential conflict between the LMRA and INA but would discourage such individuals from reentering the United States illegally.

Significantly, this court's concern in *Sure-Tan* was not with awarding reinstatement and backpay to undocumented workers, remedies which it specifically approved, but with the problem of providing those remedies to illegal aliens who have voluntarily left the United States without infringing upon the goal of the INS to deter unlawful entry into this country.

In reconciliating the statutory objectives of both the LMRA and INA, this court only focused upon the period of time an undocumented worker is *no longer* working and residing within the United States as evidenced by its criticism of the Seventh Circuit's estimation of the appropriate backpay period who did not consider the period of time the undocumented workers might have continued working before being apprehended by the INS. Thus, this court in *Sure-Tan* appeared to be concerned with *only* the period of time *after* an employee has been lawfully expelled from the United States and is offered a financial inducement under the LMRA to return illegally.

In affirming arbitration awards involving undocumented workers who remained in the United States and were not the subject of INS deportation proceedings after their discharges, the Ninth Circuit's decision in this case is not inconsistent with this court's opinion in *Sure-Tan* that undocumented workers not situated or working in the United States should not be statutorily encouraged and enticed to reenter this country illegally.

An arbitrator's decision awarding reinstatement and/or backpay to an undocumented worker who was available for work and remained in the United States after discharge after concluding that he was unjustly terminated in violation of a collective bargaining agreement does not conflict with the general federal objective expressed by this court in *Sure-Tan* of deterring unauthorized immigration into the United States.

As a result, the union respectfully requests that this court deny Bevles' Petition for a Writ of Certiorari.

DATED: December 8, 1986

Respectfully submitted,

WOHLNER, KAPLON, PHILLIPS, VOGEL, SHELLEY & YOUNG

By _____

ROBERT D. VOGEL

Counsel of Record for Respondent

APPENDIX

In the Matter of Arbitration Between TEAMSTERS LOCAL 986 and BEVLES COMPANY, INC. (M. Dorme, a.k.a. F. Noriega discharge) FMCS Case No. 83K/16910	ARBITRATOR'S OPINION AND AWARD

APPEARANCES:

For the Company:	SNYDER AND RIOS By: WILLIAM A. SNYDER, ESQ. One Newport Place 1301 Dove Street, Suite 400 Newport Beach, CA 92660
For the Union:	PAPPY, KAPLON, VOGEL & PHILLIPS By: KENNETH P. YOUNG, ESQ. RALPH M. PHILLIPS, ESQ. 1545 Wilshire Boulevard, Suite 211 Los Angeles, CA 90017
Also Present:	Manuel Dorme, a.k.a., Felipe Noriega, Grievant John Walter, President, Bevles Company, Witness Jose (Pepe) Ulloa, Witness Robert Garcia, Business Agent, IBT Helen Ruiz, Interpreter

A hearing was held in this matter at the offices of Teamsters Local 420, South El Monte, California, on August 18, 1983. All evidence and testimony were taken under oath. The parties agreed to file post-hearing briefs and waived the time limits for filing such briefs. This award is issued in timely fashion within the time limits set by the FMCS rules under which this hearing was conducted.

STIPULATIONS

The parties stipulated the grievance procedure has been followed and that the matter is properly before the Arbitrator. They stipulated the Arbitrator has the authority to determine the impact of external law on the agreement.

ISSUE

The parties stipulated in their submission agreement to the following issues for the Arbitrator to decide (JE6):

1. Was the grievant discharged for just cause?
2. If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

Article I, Section (1) (a): MANAGEMENT RIGHTS

> a. The right to manage the business, to shcedule the hours of work, to establish, modify or change work schedules or to direct and determine the size of the working forces including the right to select, hire, promote and transfer employees, *to relieve employees for just cause,* and to determine internal training procedures in accordance with policies established or to be established by the Company. (emphasis added)

FACTS OF THE CASE

The grievant was hired by the Company on January 20, 1983, in his present classification in the machine department. He was hired by then-Superintendent Jose Ulloa, his uncle. The application blank for employment was filled out by Ulloa in its entirety for the grievant. The grievant had never been asked about his legal name or application until February 1983. On February 23, 1983, the grievant suffered an on-the-job injury and was not released medically for work until August 2, 1983. The grievant was discharged on March 18, 1983, for falsification of employment records; namely, his application form.

POSITION OF THE COMPANY

The grievant testified truthfully, to his credit, that he was illegally in the United States and had no valid work authroization from the Immigration and Naturalization Service (INS). Also, he used his cousin's name and social security card while knowing his cousin was back in Tijuana. He and Ulloa conspired to defraud the Company to unlawly employ the grievant. He was paid conspired to defraud the Company to unlawfully employ the grievant. He was paid under his cousin's name and even when he became aware of or caught in the fraud, did not rectify it. Consequently, the grievant validated the fraud.

Mr. Ulloa was aware that the grievant was illegally in the US because he drove the grievant across the border. By misrepresenting the grievant on the application form, Ulloa compounded the fraud. The Company should not be bound by the actions of Ulloa and the grievant.

The Company argues that the State of California is not pre-empted from regulating the employment

relationship covered by Labor Code (LC) s.2805 in a manner consistent with pertinent Federal laws.[1] *Delores Canning Company v. Howard* (40 C.A. 3d 673, 15 Cal Rptr. 435 (1974)) was decided on an issue of Federal law. With respect to LC 2805, the appellate court said that it was "unconstitutional because Congress wanted uniform Federal regulations on employment of aliens, barring state action . . . It interferes with a comprehensive regulatory scheme enacted by Congress in . . . its exclusive power of immigration.

The court in *Delores Canning* (440,441) concluded Congress did not want to burden employers with eliminating illegal alien workers from the labor market. The court questioned whether the INA was sufficiently broad or comprehensive without an administrative agency "to pre-empt the field and bar state action." The court said also that LC 2805 was aimed at helping California residents seek jobs, not immigration control. Congress controls immigration and so California's law is not unconstitutional.

The reasoning of *Delores Canning* has been invalidated. *Delores Canning* was decided by a California appellate court on a Federal question. *Alonso v. State of California*, 50 C.A. 3d 242, 13 Cal Rptr. 536 (1975) better accomodates Federal/state regulatory conflicts. The court found no pre-emption. The plaintiff was an alien who applied for unemployment in California but refused to provide INS documents or state if he entered the United States legally. He was denied benefits because he was "unavailable for work." Yet Alonso took the

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[1]This summary of the Company's position on external law is quoted verbatim from the companion case involving the parties and grievant Barraza, decided by the Arbitrator on December 14, 1983. The Company makes the same argument herein.

same position as the grievant, citing *Delores Canning*. The *Alonso* court found both *Delores Canning* and *DeCanas v. Bica*, 40 C.A. 3d 976, 115 Cal. Rptr. 444, distinguishable and inapplicable.

Alonso found that an illegal alien has no right under the U.S. Constitution to equal employment opportunity and no right to work. Both the Federal government and State of California have a legitimate interest in the issue. One's status is not for the purpose of enforcing or subjugating the Federal immigration laws. Title VIII controls when aliens will be allowed to work in the US. The State of California has a duty not to undermine the . . . intent of Congress or alien registration laws.

The U.S. Supreme Court has invalidated the reasoning of *Delores Canning*. In *DeCanas v. Bica* the Court found that the INA did not preclude state authority to regulate employment of illegal aliens (at page 941). It has "never held" that every state law dealing with aliens is about immigration and therefore pre-empted. LC 2805 was viewed as California's effort to adopt Federal standards in imposing criminal sanctions against employers who knowingly employ undocumented aliens. LC 2805 falls within the state's police powers to regulate employment. The issue is to reconcile state and Federal laws, not to oust one over the other. This section of the labor code seems to be "designed to protect opportunities of lawfully admitted aliens . . . There is evidence that Congress intends that states may regulate the employment of illegal alines" consistent with Federal law.

Next, the Company argues the application of LC 2805 here is consistent with Federal law and legitimate state interests. It says, "No employer shall knowlingly employ an alien who is not entitled to lawful residence in the United States." In the California Administrative Code

(CAC), Title 8, part I, chapter 8, article 1, ss.16209-16209.6, it is provided that an admitted alien shall be requested to produce documents showing legal residency, which will then be sufficient proof of lawful resident status. This means the alien must have Form I-151 or any other INS document authorizing him to work in the United States. The grievant concedes he has no such documents, thus allowing the "inference that his entry into this country was illegal." (at 247)

The Company should not be penalized for the failure of the INS to enforce immigration laws or the grievant to abide by US laws. Given the grievant's posture and the enforceability of LC 2805, the grievant was discharged for just cause.

POSITION OF THE UNION

In order to uphold a dischargefor falsification of records, the Union identified the criteria commonly used by arbitrators which must be met.[2] The criteria are that "the employee gave false answers ir his application and

(1) . . . applicant willingly gave false answers;

(2) such answers were made fraudulently and deliberately;

(3) but for such answers the employee probably would not not have been hired;

(4) neither the employer or its agents has any knowledge of the falsity of such answers, and

(5) where there is no evidence . . . that the applicant made an honest mistake in giving the incorrect answers, or in omitting the information.

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[2] *Rexall Drug Company*, 39 LA 142 (H. Dworkin, 1962)

The grievant did not willfully give false answers. Except for providing Ulloa his birthdate, the grievant provided no information nor did he write out any of the answers on the application. Ulloa did so without consulting the grievant.

Any deliberate fraud was committed by Ulloa, not the grievant. The grievant should not be charged with the incorrect actions of Ulloa.

Next, the Union argues that the Company's English language program gave it constructive knowledge that some of its workers were not entitled to legal residence in the U. S. The Company provided no evidence on this point and therefore did not carry the burden of proof. Also, the grievant attended but one or two sessions briefly before dropping out.

The employer's own agent, Jose Ulloa, knew the grievant's true identity and status, but hired him anyway. There was no evidence presented that the grievant's use of an alias harmed the Company in any way during his seven (7) years of employment. Ulloa created the situation, not the grievant. Ulloa perpetuated the fraud and had hired other employees under similar circumstances.

The Company has failed to carry the burden of proof. It did not show the grievant would not have been hired but for the falsified information. The suspicious timing of the discharge and the grievant's on-the-job injury implies the Company had malicious motives.

The Union seeks back pay to August 2, 1983, the date on which the grievant was ready to return to work from medical leave, until reinstatement.

ARBITRATOR'S FINDINGS AND OPINION

The issue in this case is stipulated to be whether or not the grievant was discharged for just cause. In order to decide the issue, there are three questions which the Arbitrator must answer:

(1) Did the Company discharge the grievant for his work-related injury?

(2) What is the effect of the fraudulent information provided by the grievant or his agent?

(3) What is the impact of external law on the misrepresentations, since the false information was provided with the avoidance of these laws in mind?

The Arbitrator finds the answer to the first question is in the negative. There is no hard evidence of any kind on the record which purports to show that the Company discharged the grievant for the on-the-job injury. The Union was able to show only a correlation in time between the injury and the discharge of the grievant. However, other Hispanic workers were discharged at the same time, workers who suffered no physical injuries. Hence, the Arbitrator finds no more than coincidence relating the two events.

Next is the question of misrepresentation or falsification of records which lead directly to the discharge of the grievant. The criteria of whether or not such falsification can be grounds for just cause discharge were set out in the *Rexall* case and listed on page 5 above. These criteria become widely accepted and were reviewed in *Tiffany Metal Products Mfg. Co.* 56 LA 135, (R. Robertsm, 1971). In the latter case, Arbitrator Roberts noted the criteria were well-accepted by arbitrators, but

in the application of the criteria "precedents stand in great confusion" (at 139). There was some consistency found between limitations periods and severity of misrepresentation, factors to be considered herein.

The four criteria specified by Dworkin and relied upon by the Union (the fifth does not apply to this case) are restated:

(1) Was the misrepresentation deliberate or wilful?

(2) Were false answers made fraudulently and deliberately?

(3) But for such answers would the grievant have been hired?

(4) Did the employer or its agent have any knowledge of the falsity of such answers?

1) *Did the grievant wilfully give false answers?* The Union claims that Jose Ulloa not only filled out the application blank for the grievant, but had done so for others. Also, though the grievant's uncle, Ulloa was an agent of the Company. The Company argued that when the fraud was discovered some seven years later, the grievant claimed the information originally provided was correct even though facts indicated otherwise.

The role of Ulloa is an interesting one which puts him in a conflict-of-interest position. Much is missing from his testimony about how the grievant came to apply at the Company. Ulloa knew the grievant for some 13 years and was the grievant's uncle. On the other hand, he made many hiring decisions on behalf of the Company that were never questioned by top management; at least, the record is silent on this point.

The grievant's testimony at the hearing lead the Arbitrator to find the misrepresentations were wilful at

the time of discovery in March 1983, and there is some strong evidence to suggest wilfulness prior to that time. The grievant knew he was not Felipe Noriega, who was his cousin, but was really Manuel Dorme. Noriega, his cousin, had a valid social security card but was living in Tiajuana, Baja California, Mexico. The grievant used Noriega's social security card (CE1) and name to secure his employment. He signed his cousin's name to Company documents (CE3), declaring falsely that he was a US citizen and claiming exeptions on IRS form W-4. Even though the grievant testified he did not know English and he did not know what he was signing, he did know the difference between his own name and the name of his cousin. He even held previous jobs in the name of Felipe Noriega. So when the grievant was confronted with the true information in March 1983 and still held to the earlier misrepresentation, the grievant's conduct was wilful. There is no question about this finding.

2. *Were false answers made fraudulently and deliberately?* At the time the application was completed by Ulloa, the written misrepresentation was not deliberate on the part of the grievant. Testimony of Ulloa confirms the grievant was not aware of what Ulloa wrote on the form. The grievant's conduct became deliberate overtly in March 1983 and to a lesser degree by his use of his cousin's identity all along. The grievant testified that Felipe Noriega was his working name, not how he held himself out generally or how he intended to hold himself out to others. Corroborating testimony by Ulloa supported this contention, saying that Ulloa called the grievant Meno at work and home.

The Arbitrator finds the grievant's position a curious attempt to have it both ways. The grievant testified Ulloa drove him across the border illegally in 1974. It is clear

that the Company believed the grievant to be Felipe Noriega as late as February 1983. The grievant's own testimony and demeanor indicate that he knew his illegal status might hurt his chances for a job, so he took his cousin's legal identity. The grievant, as well as his uncle, commited deliberate misrepresentatiions.

3) *But for such answers would the grievant have been hired?* The record is clearly in the affirmative. The hiring of production workers was undisputedly the authority and responsibility of Jose Ulloa, Superintendent of Production. His hiring decisions were not overturned nor even checked by Company officers, Mr. Walter or others. Ulloa testified unrebutted that he had hired over 200 workers while he was Superintendent and with the Company.

The Union would have the Arbitrator accept that the Company had constructive knowledge that some of its workers were illegally residing in the U.S. In the sense that Ulloa was the Company's agent, that may be the conclusion to draw. But Ulloa had no reason to tell the Company that he knew he was hiring an illegal worker. Even though the Company is liable for the acts of its agents, it had no guilty knowledge at the time the grievant was hired. The record suggests strongly the grievant would have been hired in any event because of the role of Ulloa.

Also, the misrepresentations were not material at the time of hire, according to Arbitrator Roberts' criteria. There is no evidence of any kind to show the Company was actively checking documentation to avoid immigration problems when the grievant was hired in January 1976. Sometime later in 1976 the Company was raided by the INS, but the grievant was not one of the two employees arrested.

4) *Did the employer or its agent have any knowledge of the falsity of such answers?* Again, the Arbitrator finds from the record that the answer is affirmative. At least, the Company's agent, Ulloa, knew of and perpetuated the falsehood. Ulloa held a high management position and was not questioned about his hiring decisions. When Ulloa left the Company some time after hiring the grievant, the Company did not review hiring decisions nor should they have necessarily done so unless problems were present.

As the Union noted, there was no apparent harm to the Company as a result of the misrepresentation. The grievant was a good worker although this would not of itself excuse a serious violation. He was not picked up in the INS raid in 1976, a factor about which the Company had great concern. The Company was concerned about the potential criminal liability for violation of LC s2805 and Federal immigration laws. As will be discussed below, the Arbitrator has found previously that there was not any risk of this liability being realized.

The Company considered the oral misrepresentation by the grievant as a material factor at the time of the discharge, as the grievant's termination letter stated (JE2). The falsehood was discovered when the Company began an INS document check after receiving an unsolicited newsletter from an outside attorney. Initially the Comapny requested verification of status (CE6) and in doing so found the misrepresentation. Rather than terminate him for no documentation, the Company terminated the grievant for verbally confirming his uncle's misrepresentations made on his behalf.

However, the discussion of materiality by the Arbitrator in *Dayton Malleable Iron Company,* 54 LA

1192 at 1194 (R. Howlett, 1970) is instructive. In footnote one, Arbitrator Howlett cites a decision by Arbitrator Shulman wherein the offense was considered not continuing and therefore non-material after one year of satisfactory performance by the grievant. In the instant case, seven years of satisfactory performance had elapsed before discharge. Even though the Company acted promptly on discovery of its agent's fraud and raised the defense of the continuing nature of the grievance, Arbitrator Shulman's rule mitigates against materiality.

External Law[3] A major finding of fact upon which this case hinges is whether or not LC 2805 is valid and enforced. The several court cases submitted into evidence by the parties trace a line of legal decisions which appear at first blush to declare LC 2805 unconstitutional (*Delores Canning v. Howard,* supra). Then there is *DeCanas v. Bica* (supra) in which the U.S. Supreme Court (USSC) specifically reversed the reasoning of *Delores Canning.* Yet *DeCanas* was dropped by its plaintiff before it could be reheard by the California Court of Appeals. No cases on this point followed *DeCanas* nor has the California Legislature acted to clarify the area. In addition, CAC sections 16209-16209.6 were removed from the C.A.C. on December 15, 1982. The permanent injunction issued by the Superior Court judge in *Delores Canning* appears to be still in effect.

A careful reading of *DeCanas* shows that the Court did specifically discuss LC 2805 and its constitutionality. First, the Court said that LC 2805 was not an "invalid state incursion on federal power" (at 936). The Court saw California's motiviation in passing LC 2805 was

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[3]This section of the opinion is edited from the companion case between the parties involving grievant Barraza. Specific findings rather than rationale are highlighted.

economic, to control employment under its police powers, not to control immigration. A state has the right to use its police powers to protect citizens and legal aliens (at 936). So the Court said that LC 2805 was not unconstitutional. California was not necessarily pre-empted from acting in this area.

However, the lifting of the permanent injunction of *Delores Canning* was left to the Califronia court on remand, which never came when the case was dropped by the plaintiff. The USSC said,

> "there are quesitons of construction of s.2805(a) to be settled by the California courts before a determination is appropriate whether, as construed, s. 2805(a), can be enforced without impairing the Federal superintendence of the field covered by the INA . . ." *DeCanas* at 940.
>
> "it is for the California courts to decide the effect of these administrative regulations in construing s. 2805(a), and thus to decide in the first instance whether and to what extent s2805 as construed would conflict with the INA or other Federal laws or regulations." *DeCanas* at 941.

According to the record before the Arbitrator, LC s2805 is in limbo and still enjoined. Neither the state legislature nor Court of Appeals have acted to lift the injunction.

The Company seeks to show the validity of LCs2805 through the introduction of *Alonso v. State of California,* (50 CA 3d 242, 123 Cal Rptr. 536, 1975). *Alonso* found, in part, that an alien in the U.S. illegally has no constitutional right to work nor does that alien have the right to equal employment opportunity (at 248). The *Alonso* court specifically denied Alonso the

protective umbrella of *Delores Canning* and *DeCanas* because the plaintiffs in these cases were U.S. citizens and Alonso was an undocumented alien. Also, the Labor Code was not an issue in *Alonso* but was used by the plaintiff to shield himself to claim unemployment. Thus, *Alonso* denies protection to illegal aliens with respect to employment. This is consistent with later cases such as *ILGWU v. Sureck,* 681 Fed 2d 624 (9th Circuit), a case not on point but which did require specific knowledge of alien status and a search warrant before the INS could search the workplace. The dissenting opinion in *Alonso* is noteworthy because it establishes that the injunction against enforcement of 2805 was still law in California.

Findings on Just Cause The Arbitrator finds that the evidence and record taken as a whole do not not support a finding of just cause for *discharge* of the grievant. While the wilful and deliberate misrepresentation by the grievant took place in March 1983, at the time of the discharge, materiality was diminished by the long passage of time after hire and by the unenforceability of external law. The Company's own agent perpetrated the misrepresentation for the benefit of the grievant although no harm came to the Company. The misrepresentation was not material at the time of hire. It could have been discovered with background checks although such checks are prudent but not legally required. At the time of the discharge, the falsehood was not material as it was not found by the Arbitrator to be a continuing one.

In fact, the recrod strongly suggests the real motivation for the discharge was the grievant's presumed illegal status and the fact of the uncle's and the grievant's falsehoods were used as the basis for termination.

Undisputed testimony of the grievant showed that other employees were treated differently, especially one M. Kiones (sic), who was not discharged. However, only the grievant falsified his name, a problem that will be resolved in establishing the remedy.

Remedy The Union has demanded reinstatement with back pay to August 2, 1983, the date the grievant was cleared medically to return to work. However, the Arbitrator is not willing to grant the full relief requested. Instead the Arbitrator will modify the discharge to a suspension without pay to the date of reinstatement.

The Arbitrator is mindful that in modifying the discipline from discharge to suspension without pay, the expectations of both parties may not be met. However, this case presents a unique situation and facts involving the labor agreement, external law and different levels of misrepresentation. The circumstances discussed above place responsibility on many shoulders, not just those of the grievant or the Company.

The fact that the grievant misrepresented his true identity is undeniable, even though the Company did not discover it for seven years. In the meantime, the grievant did hold himself out to be someone else while maintaining a good work record. Although mitigating circumstances take away materiality for discharge, the grievant commited a serious offense of a wilful and deliberate nature. Half of the Dworkin criteria were satisfied. To let this act pass without any discipline could make a mockery of the Company's ability to carry out its legitimate functions. Control of the workforce could become difficult, if not impossible. By letting a worker commit a serious, wilful act of misrepresentation with impunity would lessen Management's ability to take proper discipline or discharge action. His coworkers knew, according to testimony of the grievant, that he

was not legal. They knew who was and who was not legally in the U.S. So the grievant was not innocent of all accountability.

There is no language in the labor agreement which expressly allows or restricts the Arbitrator's authority to modify penalties or remedies. At the same time, the Arbitrator is aware of the famous phrase about dispensing "his own brand of industrial justice." *Enterprise Wheel and Car*, one of the trilogy cases, recognized the Arbitrator does have "powers to formulate remedies. . . compatible with national labor policy. . . to reach a "fair solution of a problem. . . . The need is for flexibility in meeting a wide variety of situations." " As Arbitrator Ross noted,[4] in discharge cases (arbitrators) "are not brought in to try the facts, but to review the employer's judgment" as to whether there was sufficient cause for discharge.

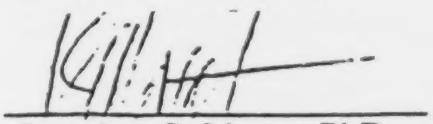
The role of the grievant in this case was a significant one, though mitigated by circumstances discussed above. The Arbitrator would not normally deny the remedy requested or modify the Company's disciplinary action were it not for these special circumstances. It is reasonable for the Arbitrator to make such modifications herein.

Thus, the Company is directed to reinstate the grievant without back pay.

AWARD

The grievant shall be reinstated without back pay.

December 26, 1983
Long Beach, CA



Jonathan S. Monat, PhD
Arbitrator

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[4]quoted from Owen Fairweather, *Practice and Procedure in Labor Arbitration,* 2nd edition, BNA Books, 1983, at 496, 498.

CERTIFICATE OF SERVICE

NO. _____

In The Supreme Court

Of The

United States

OCTOBER TERM, 1986

BEVLES COMPANY, INC.,

Petitioner,

vs.

TEAMSTERS LOCAL 986,

Respondent.

I, ROBERT D. VOGEL, a member of the Bar of this Court, hereby certify that on this 8th day of December, 1986, three copies of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the above case were mailed, first class postage prepaid, to William A. Snyder, Esq. of Snyder, Rios & Quevedo, 2151 Michelson Drive, Suite 100, Irvine, California 92715, legal counsel for Petitioner Bevles Company, Inc., and hereby certify that all parties required to be served have been served with such.

DATED: _____

WOHLNER, KAPLON, PHILLIPS,
VOGEL, SHELLEY & YOUNG

By _____

ROBERT D. VOGEL

Counsel of Record for Respondent